

1                                   **UNITED STATES DISTRICT COURT**  
2                                   **DISTRICT OF NEVADA**

3       WELLS FARGO BANK, N.A.,

4               Plaintiff

5       v.

6       KARI LEE LIMITED PARTNERSHIP, et al.,

7               Defendants

Case No.: 2:17-cv-01184-APG-VCF

**Order Granting Saticoy's Motion for  
Summary Judgment and Denying Wells  
Fargo's Motion for Summary Judgment**

[ECF Nos. 47, 50]

8               The parties dispute whether a deed of trust still encumbers property located at 5451  
9       Autumn Crocus Court in North Las Vegas, Nevada following two non-judicial foreclosure sales  
10      conducted by a homeowners association (HOA), defendant Arbor Park Community Association  
11      (Arbor Park). Plaintiff Wells Fargo, N.A. (Wells Fargo) is the beneficiary of record for the deed  
12      of trust. Defendant Saticoy Bay LLC Series 5451 Autumn Crocus (Saticoy) is the current  
13      property owner.

14              Wells Fargo seeks a declaration that the deed of trust continues to encumber the property.  
15      Wells Fargo also asserts an unjust enrichment claim against Saticoy, Arbor Park, and Arbor  
16      Park's foreclosure agent, defendant Absolute Collection Services LLC (Absolute).<sup>1</sup> Finally,  
17      Wells Fargo asserts alternative damages claims against Arbor Park and Absolute. Saticoy  
18      counterclaims for a declaration that it acquired the property free and clear of the deed of trust.

19              Wells Fargo and Saticoy move for summary judgment on their competing declaratory  
20      relief claims on a variety of grounds. Arbor Park opposes Wells Fargo's motion but did not file  
21      its own motion for summary judgment. The parties are familiar with the facts so I do not repeat

22 \_\_\_\_\_  
23 <sup>1</sup> Wells Fargo also brought claims against Alarisa Properties, LLC and Kari Lee Limited  
Partnership, but those claims were dismissed after Wells Fargo failed to provide proof of timely  
service. ECF No. 32.

1 them here except where necessary. I grant Saticoy’s motion and deny Wells Fargo’s motion  
2 because Wells Fargo did not tender the superpriority amount and it has not raised a genuine  
3 dispute that any basis exists to set aside the 2014 HOA foreclosure sale. Wells Fargo’s claims  
4 for unjust enrichment, tortious interference with contract, wrongful foreclosure, and negligence  
5 remain pending because no party moved for summary judgment on those claims.

## 6 **I. ANALYSIS**

7 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to  
8 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
9 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”  
10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence  
11 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

12 The party seeking summary judgment bears the initial burden of informing the court of  
13 the basis for its motion and identifying those portions of the record that demonstrate the absence  
14 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
15 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a  
16 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
17 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
18 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
19 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
20 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
21 F.3d 915, 920 (9th Cir. 2008).

22 ////

23 ////

1           **A. Statute of Limitations**

2           Saticoy argues that Wells Fargo’s declaratory relief claim is untimely because it was  
3 brought more than three years after the 2014 HOA foreclosure sale. I have previously ruled that  
4 the four-year catchall limitation period in Nevada Revised Statutes § 11.220 applies to claims  
5 under Nevada Revised Statutes § 40.010 brought by a lienholder seeking to determine whether  
6 an HOA sale extinguished a deed of trust. *See Bank of Am., N.A. v. Country Garden Owners*  
7 *Ass’n*, No. 2:17-cv-01850-APG-CWH, 2018 WL 1336721, at \*2 (D. Nev. Mar. 14, 2018). The  
8 HOA sale took place on February 11, 2014. ECF No. 47-3. Wells Fargo filed its complaint on  
9 April 27, 2017. ECF No. 1. Because Wells Fargo’s complaint was brought within four years of  
10 the 2014 HOA foreclosure sale, its claim to determine adverse interests in property under  
11 § 40.010 is timely.<sup>2</sup>

12           **B. Due Process**

13           I grant Saticoy’s motion as to the due process allegations. *Bourne Valley Court Trust v.*  
14 *Wells Fargo Bank, N.A.*, 832 F.3d 1159 (9th Cir. 2016) is no longer good law and the HOA  
15 foreclosure statutes do not violate due process. *See Bank of Am., N.A. v. Arlington W. Twilight*  
16 *Homeowners Ass’n*, 920 F.3d 620, 623-24 (9th Cir. 2019) (citing *SFR Invs. Pool I, LLC v. Bank*  
17 *of N.Y. Mellon*, 422 P.3d 1248 (Nev. 2018) (en banc)); *Nationstar Mortg. LLC v. Amber Hills II*  
18 *Homeowners Ass’n*, No. 2:15-cv-01433-APG-CWH, 2016 WL 1298108, at \*6-9 (D. Nev. Mar.  
19 31, 2016).

20 ////

21 ////

22 \_\_\_\_\_  
23 <sup>2</sup> I need not address whether Wells Fargo’s declaratory relief claim is timely as to the 2007 HOA  
foreclosure sale because, as discussed below, interest Wells Fargo had in the property was  
extinguished by the 2014 HOA foreclosure sale.

1           **C. Tender**

2           Wells Fargo argues that its loan servicer, Ocwen Loan Servicing, LLC (Ocwen), was  
3 excused from attempting an actual payment of the superpriority amount because Absolute  
4 represented to Ocwen that it would reject a payment. Saticoy and Arbor Park argue that Ocwen  
5 never tendered and there is no evidence to support excuse or futility of tender.

6           Under Nevada law, a “first deed of trust holder’s unconditional tender of the superpriority  
7 amount due results in the buyer at foreclosure taking the property subject to the deed of trust.”  
8 *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 427 P.3d 113, 116 (Nev. 2018) (en banc). To  
9 be valid, tender must be for “payment in full” and must either be “unconditional, or with  
10 conditions on which the tendering party has a right to insist.” *Id.* at 118.

11           A “promise to make a payment at a later date or once a certain condition has been  
12 satisfied cannot constitute a valid tender.” *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*,  
13 435 P.3d 1217, 1219 (Nev. 2019). But when a party who is able and willing to pay offers to  
14 satisfy the superpriority amount and is told that the payment will not be accepted, actual tender  
15 of the payment is excused. *Id.* at 1220 (holding that an offer to pay the superpriority amount  
16 combined with a rejection of that offer “operated to cure the default as to that portion of the lien  
17 such that the ensuing foreclosure sale did not extinguish the first deed of trust”).

18           Many months prior to the 2014 HOA sale, Ocwen requested a payoff amount by  
19 contacting Absolute and stating that Ocwen “would be making payments on this account,” so  
20 “please provide [Ocwen] the invoice along with the coverage dates and a good payoff amount  
21 good through 10/31/2013 or later.” ECF No. 56-23 at 2. Absolute provided a statement of  
22 account which identified the monthly assessment amount, late fees, collection costs, an audit fee,  
23 collection costs, and the total amount due. ECF No. 47-15 at 3-4. The statement of account also

1 contained the following language: “This is not a pay off amount and is not valid for any transfer  
2 of the property; Evidence of foreclosure required for 9 month statement (foreclosure  
3 deed/auction receipt).” *Id.* at 3. Absolute provided Ocwen with two more updated account  
4 statements, each with the same quoted language. ECF Nos. 50-1 through 50-3.

5         Despite receiving three statements of account from which it could calculate the  
6 superpriority amount, Ocwen did not attempt to tender payment. There is no evidence  
7 explaining why Ocwen did not attempt tender. There is no evidence Ocwen knew Absolute had  
8 a policy of rejecting tender payments or that Ocwen relied on that policy in failing to make a  
9 tender attempt. There is no evidence that Ocwen understood the quoted language on the account  
10 statements to mean that Absolute would reject a tender payment or that Ocwen relied on the  
11 quoted language as the reason not to tender payment. And there is no evidence that Absolute  
12 otherwise communicated to Ocwen that it would reject a payment. As a result, no genuine  
13 dispute remains that Wells Fargo, through Ocwen, did not tender the superpriority amount and  
14 there is no evidence that tender should be excused. *See Nationstar Mortg., LLC v. 2016*  
15 *Marathon Keys Tr.*, No. 75967, 455 P.3d 842, 2020 WL 407057, at \*1 (Nev. 2020) (rejecting an  
16 argument that tender should be excused because “no evidence indicates that Miles Bauer decided  
17 not to make a payment because it could not calculate the superpriority amount or because it knew  
18 ACS would reject a superpriority tender”); *Bank of Am., N.A. v. Las Vegas Rental & Repair, LLC*  
19 *Series 57*, No. 76914, 451 P.3d 547, 2019 WL 6119134, at \*1 n.3 (Nev. 2019) (rejecting the  
20 lender’s “excused-for-futility argument” because it was “not supported by any evidence” where  
21 “no evidence suggests that Miles Bauer decided not to tender because it knew NAS would reject  
22 it.”). Consequently, I deny Wells Fargo’s motion as to tender.

23 ////

1           **D. Equitably Setting Aside the Sale**

2           Wells Fargo argues that the sale should be equitably set aside because the price was  
3 inadequate and Absolute led Ocwen to believe the first deed of trust was not in jeopardy because  
4 Absolute represented there was no superpriority lien until the beneficiary foreclosed on the deed  
5 of trust. Wells Fargo also contends that the foreclosure notices improperly included fees and  
6 costs in the lien and did not identify the superpriority amount. Arbor Park and Saticoy argue  
7 there is no basis to set aside the sale because there is no evidence Ocwen failed to tender the  
8 superpriority amount due to Absolute's alleged policy of rejecting payment. Arbor Park also  
9 argues that although fees and costs are not included in the superpriority lien, they are included in  
10 the HOA's overall lien, and there was no requirement that the notices identify the superpriority  
11 amount. Arbor Park and Saticoy also contend there is no evidence that any alleged unfairness  
12 brought about the sale price.

13           In determining whether to equitably set aside an HOA foreclosure sale, there must be  
14 evidence that the HOA sold the property for an inadequate price and that "the sale was affected  
15 by some element of fraud, unfairness, or oppression." *Nationstar Mortg., LLC v. Saticoy Bay*  
16 *LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 646, 648-49 (Nev. 2017). As the party  
17 challenging the sale, Wells Fargo has "the burden to show that the sale should be set aside in  
18 light of [Saticoy's] status as the record title holder . . . and the statutory presumptions that the  
19 HOA's foreclosure sale complied with NRS Chapter 116's provisions." *Id.* at 646 (internal  
20 citations omitted). "[M]ere inadequacy of price is not in itself sufficient to set aside the  
21 foreclosure sale, but it should be considered together with any alleged irregularities in the sales  
22 process to determine whether the sale was affected by fraud, unfairness, or oppression." *Id.* at  
23 648. The fraud, unfairness, or oppression must have affected "the sale itself." *Res. Grp., LLC as*

1 *Tr. of E. Sunset Rd. Tr. v. Nevada Ass’n Servs., Inc.*, 437 P.3d 154, 160 (Nev. 2019) (en banc)  
2 (emphasis omitted). “A grossly inadequate price may require only slight evidence of fraud,  
3 unfairness, or oppression to set aside a foreclosure sale.” *SFR Invs. Pool 1, LLC v. First Horizon*  
4 *Home Loans, a Div. of First Tenn. Bank, N.A.*, 409 P.3d 891, 895 (Nev. 2018) (en banc).

5 Wells Fargo has failed to present evidence that any fraud, unfairness, or oppression  
6 affected the sale. As discussed above, there is no evidence Ocwen tendered and no evidence  
7 Ocwen did not tender because of Absolute’s alleged policy of rejecting payment. Although  
8 Wells Fargo argues that Absolute led Ocwen to believe the first deed of trust was not in  
9 jeopardy, there is no evidence that Ocwen held that belief or that it did so as a result of the  
10 quoted language in the account statements. There is no evidence Ocwen or Wells Fargo relied  
11 on the alleged futility of tender as a reason not to attend the sale and bid on the property or to  
12 take other measures to protect the deed of trust. And there is no evidence that Ocwen or Wells  
13 Fargo alerted anyone about a tender attempt such that other bidders may have bid less given the  
14 possibility that the superpriority lien had been satisfied. In sum, there is no evidence that  
15 anything related to tender constituted fraud, unfairness, or oppression, or in any way affected the  
16 sale.

17 The same is true for the notices. The HOA was not required to identify that it was  
18 foreclosing on a superpriority lien or the amount of the superpriority lien. *See SFR Investments*  
19 *Pool 1 v. U.S. Bank*, 334 P.3d 408, 418 (Nev. 2014) (en banc); *PennyMac Corp. v. SFR*  
20 *Investments Pool 1, LLC*, No. 73405, 425 P.3d 719, 2018 WL 4413612, at \*3 (Nev. 2018).  
21 Collections fees and foreclosure costs are not included in the superpriority portion of the HOA’s  
22 lien. *Horizons at Seven Hills v. Ikon Holdings*, 373 P.3d 66, 73 (Nev. 2016) (en banc). But *Ikon*  
23 did not hold that foreclosure notices are defective or unfair if they include collection costs or

1 other fees in the subpriority portion of the lien. Further, Wells Fargo has not presented evidence  
2 that the inclusion of these costs in the overall lien amount was so unfair that it would justify  
3 setting aside the sale. *See S. Capital Pres., LLC v. GSAA Home Equity Tr. 2006-5*, No. 72461,  
4 414 P.3d 808, 2018 WL 1447727, at \*1 (Nev. 2018) (stating that inclusion of improperly  
5 incurred fees does not support setting aside a sale unless it is shown “how inclusion of those fees  
6 either misled respondent or otherwise brought about the low sales price”).

7 Wells Fargo has not presented sufficient evidence to equitably set aside the sale. I  
8 therefore deny Wells Fargo’s motion for summary judgment and grant Saticoy’s motion for  
9 summary judgment. The 2014 HOA foreclosure sale extinguished the deed of trust. *SFR*  
10 *Investments Pool 1*, 334 P.3d at 419 (“NRS 116.3116(2) gives an HOA a true superpriority lien,  
11 proper foreclosure of which will extinguish a first deed of trust.”).

## 12 **II. CONCLUSION**

13 I THEREFORE ORDER that plaintiff Wells Fargo Bank, N.A.’s motion for summary  
14 judgment (**ECF No. 50**) is **DENIED**.

15 I FURTHER ORDER that defendant Saticoy Bay LLC Series 5451 Autumn Crocus’s  
16 motion for summary judgment (**ECF No. 47**) is **GRANTED**. It is declared that the deed of trust  
17 executed on September 25, 2003 and recorded on October 16, 2003 no longer encumbers the  
18 property located at 5451 Autumn Crocus Court in North Las Vegas, Nevada because it was  
19 extinguished by the foreclosure sale conducted by Arbor Park Community Association on  
20 February 11, 2014.

21 DATED this 18th day of February, 2020.

22  
23   
\_\_\_\_\_  
ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE